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FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

ALLAN APATANG TAITANO

Defendant.

) **CRIM. CASE NO. 13-0111E**
)
) **ORDER DENYING**
) **COMMONWEALTH'S MOTION TO**
) **RECONSIDER THE COURT'S ORDER**
) **GRANTING DEFENDANT'S SECOND**
) **MOTION TO EXCLUDE TESTIMONY**
) **OF NUKEY MANGLONA BASED ON**
) **DUE PROCESS RIGHT TO ACCESS**
) **WITNESSES WITHOUT GOVERNMENT**
) **INTERFERENCE (PROSECUTORIAL**
) **MISCONDUCT)**

I. INTRODUCTION

This matter came before the Court on April 2, 2015 on the Commonwealth's Motion to Reconsider in Courtroom 220A. Defendant Allan ApatangTaitano¹ was present and represented by Assistant Public Defender Eden Schwartz ("APD Schwartz") and Chief Public Defender Douglas Hartig ("CPD Hartig"). The Commonwealth was represented by Assistant Attorney General Clayton Graef.

At the outset, the Court notes that the present motion to reconsider is actually a motion to reconsider the Court's granting of a prior motion to reconsider. These two motions to reconsider relate to the testimony of the alleged victim in this case, NukeyManglona. In the initial motion to reconsider, granted by the Court on October 22, 2014, the Defendant was asking that the Court

¹ In the Second Amended Information, the Defendant was charged with Attempted Sexual Assault in the 2nd Degree under 6 CMC § 301(a) and 6 CMC § 1302(a)(1), Assault and Battery under 6 CMC § 1202(a), False Arrest under 6 CMC § 1422(a), and Disturbing the Peace under 6 CMC § 3101(a). Allegedly, while seated in a parked vehicle with the alleged victim, the Defendant attempted to reach for the alleged victim's genital area. Both the Defendant and alleged victim are adult males.

1 reconsider a prior order related to whether NukeyManglona had been discouraged from speaking
2 with defense counsel as a result of prosecutorial misconduct. The Court granted the Defendant's
3 motion to reconsider, the first of the two motions to reconsider, excluding NukeyManglona's
4 testimony to remedy prosecutorial misconduct. The following day, on October 23, 2014, the
5 Commonwealth filed the present motion to reconsider, asking that the Court reconsider its
6 exclusion of NukeyManglona's testimony.² The complete procedural history and background will
7 be discussed in detail below.

8 Based on a review of the filings, oral arguments, and applicable law, the Court **DENIES** the
9 Commonwealth's motion to reconsider.

10 **II. BACKGROUND**

11 This case is an alleged attempted sexual assault case, and the present motion to reconsider is
12 related to the testimony of the alleged victim, NukeyManglona. In essence, the Defendant alleged
13 that the defense team did not have adequate access to NukeyManglona, a vital witness, as a result of
14 prosecutorial interference. A number of motions were filed, both in this courtroom, as well as in
15 Courtroom 223, related to the issue of the defense team's access to NukeyManglona.

16 **1. Orders Issued in Courtroom 223**

17 This case was originally in Courtroom 223 before the Honorable Judge David A. Wiseman.
18 The jury trial in this case was originally scheduled for June 2, 2014, but was continued multiple
19 times until a trial date was set for October 14, 2014. On October 13, 2014, this case was reassigned
20 to the undersigned Judge Joseph N. Camacho in Courtroom 220. There were multiple motions and
21 orders related to NukeyManglona's testimony while this case was in Courtroom 223. These
22 motions, and the corresponding court orders, will be discussed separately below.

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24 ² The second motion to reconsider was not heard by the Court until April 2, 2015, as a stay had been issued in this case by the Commonwealth Supreme Court in October, 2014. *Commonwealth v. Taitano*, No. 2014-SCC-0021-CRM (NMI Sup. Ct. Oct. 24, 2014) (Order Granting Stay).

1 **a. Defendant’s Motion to Exclude Testimony of NukeyManglona**

2 The first motion was the Defendant’s Motion to Exclude Testimony of NukeyManglona,
3 filed on August 19, 2014. A few days prior, NukeyManglona did not attend an appointment in
4 Rota³ he had with the Defendant’s attorney and the Office of the Public Defender (“OPD”)
5 investigator. NukeyManglona indicated that he did not attend the appointment, as he had spoken
6 with someone from the Office of the Attorney General (“OAG”), and he was advised not to speak
7 with the defense team as “it was not good for [his] case.” Aff. Ulysses Kapileo (Aug. 19, 2014).

8 The Court ordered Assistant Attorney General Badawy (“AAG Badawy”) to submit an
9 affidavit explaining what had happened. In her affidavit, AAG Badawy stated that, “I told him,
10 ‘You’re an adult. You make the choice to speak to whomever you want . . . [h]owever, that person
11 will be working on Defendant’s case, and it is not in your best interest to speak with them, if you
12 don’t want to speak with them, because they represent the Defendant.” Aff. Margo Badawy (Aug.
13 20, 2014). OAG Investigator Babauta (“Babauta”) also indicated that, “[W]e are not telling him not
14 to talk to the defense counsel but as AAG Badawy said, it wouldn’t be in the best interest for the
15 case because they represent the defendant.” Aff. Urbano D. Babauta (Aug. 20, 2014).

16 The Court denied the Defendant’s motion to exclude on September 12, 2014.⁴The Court
17 found that the statements made by AAG Badawy and Babauta were not “affirmative advice not to
18 talk with opposing counsel.” *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Sept.
19 12, 2014) (Order Den. Def.’s Mot. to Exclude Test. at 5) (“September 12, 2014 Order”). The Court
20 found the facts of this case to be similar to *United States v. Black*, 767 F.2d 1334 (9th Cir. 1985).
21 The Court did not find prosecutorial misconduct, but reminded the OAG that “prosecutors and other
22 officials must ‘maintain a posture of strict neutrality when advising witnesses of their duties and

23 _____
24 ³ The alleged incident occurred in Saipan, but the alleged victim lives in Rota, which is why the defense team traveled to Rota to interview him.

⁴This order was issued by Judge Wiseman.

1 rights . . . [as t]heir role as public servants and protectors of the integrity of the judicial process
2 permits nothing less.” *Taitano*, Crim. No. 13-0111 (Order Den. Def.’s Mot. to Exclude Test. at 6)
3 (quoting *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978)).

4 The Court did not exclude NukeyManglona’s testimony in the September 12, 2014 Order.
5 *Id.* Rather, the Court ordered an alternative remedy based on the Defendant’s right to equal access
6 to the witnesses and to prepare his defense. *Id.* The Court first granted a deposition of
7 NukeyManglona in the September 12th Order, but then revised that decision in a subsequent order
8 on September 23, 2014, ordering NukeyManglona to be available for an interview with defense
9 counsel. The Court ordered that the OAG pay for NukeyManglona to fly from Rota to Saipan for an
10 interview, but left the ultimate decision about whether or not to proceed with the interview to
11 NukeyManglona. *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Sept. 23, 2014)
12 (Minute Order).

13 **b. Defendant’s Second Motion to Exclude Testimony of NukeyManglona**

14 The Defendant filed a Second Motion to Exclude Testimony of NukeyManglona in Light of
15 New Evidence on October 7, 2014. The Defendant argued that the remedy ordered by the Court on
16 September 12, 2014 and September 23, 2014—that NukeyManglona be available for an interview
17 with defense counsel—did not successfully protect the Defendant’s due process rights. In particular,
18 the Defendant cited a heated incident between AAG Badawy and CPD Hartig that occurred within
19 earshot of NukeyManglona on October 2, 2014.⁵

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24 ⁵ This incident, which occurred on October 2, 2014, will be discussed in full below under II. 2. a. “The Court’s Findings of Fact Related to the October 2, 2014 Incident.”

1 The Court denied this motion on October 9, 2014,⁶ and the Court found that no prejudice
2 resulted from the circumstances surrounding NukeyManglona's interview. There was no
3 evidentiary hearing held on this issue.

4 **2. Judge Camacho's Order Regarding the Defendant's Motion to Reconsider**

5 On October 14, 2014, after this case had been transferred to Judge Camacho in Courtroom
6 220, the Defendant filed his Motion to Reconsider. This Motion to Reconsider was related to the
7 Court's October 9, 2014 decision finding that no prejudice had resulted from the circumstances
8 surrounding NukeyManglona's interview. In his Motion to Reconsider,⁷ the Defendant made
9 several arguments: that there was clear error in that the Court did not apply controlling ethical
10 standards to determine whether there had been prosecutorial misconduct; that the Court did not
11 order an evidentiary hearing to determine the factual disputes; and, that the Court did not give any
12 weight to the evidence offered by the Defendant in support of the Defendant's Second Motion to
13 Exclude Testimony of NukeyManglona.

14 On October 21, 2014, Judge Camacho held an evidentiary hearing to determine whether any
15 representatives from the Commonwealth discouraged NukeyManglona from speaking with defense
16 counsel. NukeyManglona appeared briefly at the Rota Courthouse on October 21, 2014 for the
17 evidentiary hearing, stayed in the building for about thirty minutes, and left without testifying. The
18 Court heard testimony from KeolaFitial, a victim advocate and employee of the OAG, and Ulysses
19 Kapileo, an investigator with the OPD. Based on this hearing, the Court found that there had been

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22 ⁶This order was issued by Judge Wiseman.

23 ⁷ The Court granted the Defendant's Motion to Reconsider, as it was "clear error to rule that the events surrounding Mr.
24 Manglona's interview did not prejudice Defendant Taitano without holding an evidentiary hearing and applying the
standard to the facts determined from that hearing." *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct.
22, 2014) (Order Granting Defendant's Second Motion to Exclude Testimony of NukeyManglona Based on Due
Process Right to Access Witness Without Government Interference (Prosecutorial Misconduct) at 7).

1 an argument between AAG Badawy and CPD Hartig within earshot of NukeyManglona on October
2 2, 2014, when NukeyManglona had flown to Saipan from Rota to meet with the Defense team.

3 **a. The Court's Findings of Fact Related to the Events of October 2, 2014**

4 Based on the October 21, 2014 evidentiary hearing, the Court made a number of findings of
5 fact related to the events of October 2, 2014. These findings were outlined in the Court's Order
6 Granting Defendant's Second Motion to Exclude Testimony of NukeyManglona Based on Due
7 Process Right to Access Witnesses Without Government Interference (Prosecutorial Misconduct),
8 issued on October 22, 2014. The Court will detail some of these findings here.

9 The October 22, 2014 Order referred to some of the events of October 2, 2014 as "the 'Little
10 Bitch' Incident" to distinguish the events of October 2, 2014 from any earlier actions made by AAG
11 Badawy that would have discouraged NukeyManglona from speaking with the OPD, as well as any
12 actions taken towards NukeyManglona's mother, Cathy Manglona.⁸ In addition, the title "the 'Little
13 Bitch Incident'" allowed the court to differentiate between AAG Badawy's actions on October 2,
14 2014 prior to calling CPD Hartig a "little bitch," and the argument between AAG Badawy and CPD
15 Hartig itself.

16 To comply with the Court's orders that NukeyManglona be available for an interview with
17 defense counsel, Dixie Inos, a victim advocate at OAG, made arrangements for NukeyManglona to
18 fly from Rota to Saipan on October 2, 2014. APD Schwartz spoke with Ms. Inos and requested the
19 flight information so that APD Schwartz could pick NukeyManglona up from the airport.

21 ⁸The Court issued a separate order on October 23, 2014 regarding the exclusion of the testimony of Cathy Manglona,
22 NukeyManglona' mother. *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 23, 2014) (Order
23 Granting Exclusion of Cathy Manglona's Testimony Due to Spill-Over Effects of Prosecutorial Misconduct at 2). In
24 particular, Cathy Manglona declined to speak with OPD staff, saying, "I think I better talk to Ms. Brown first,"
referring to AAG Badawy by her maiden name. *Id.* at 3, 5. Cathy Manglona also told OPD staff, "I don't want to talk to
you because I don't wanna jeopardize my case." *Id.* at 5. The Court, in its October 23, 2014 order, found that Cathy
Manglona declined to speak with OPD staff in September 2014 because the advice from AAG Badawy to
NukeyManglona that speaking to the OPD was not in his best interest had spilled over to Cathy Manglona. *Id.* at 6.

1 APDSchwartz was not informed of NukeyManglona's flight information, but was contacted once
2 NukeyManglona had already been transported to the OAG office in Susupe. APD Schwartz had
3 limited information about when NukeyManglona would arrive in Saipan.

4 KeolaFitial was instructed by Dixie Inos to pick up NukeyManglona at the airport. When
5 Ms. Fitial picked NukeyManglona up at the airport, his demeanor was relaxed. When Ms. Fitial and
6 NukeyManglona arrived at the OAG office, AAG Badawy began running interference to discourage
7 NukeyManglona from speaking with defense counsel, by showing him the Court's order directing
8 his appearance on Saipan, emphasizing that it is up to him whether he speaks with the defense team.
9 The order from Courtroom 223 was for an interview, and AAG Badawy was creating an
10 atmosphere that would pre-dispose NukeyManglona to refuse a defense interview. AAGBadawy
11 then called the OPD and spoke with APD Schwartz. During the course of the phone conversation,
12 NukeyManglona could see that AAG Badawy was becoming increasingly frustrated, and that the
13 conversation was becoming heated.

14 A few minutes later, APD Schwartz and CPD Hartig arrived at the OAG office and entered
15 the reception area. AAG Badawy walked from her office to the reception area, followed by Ms.
16 Fitial and NukeyManglona. There is glass separating the public reception area from the attorney
17 offices. AAG Badawy stood on the office side of the glass while APD Schwartz and CPD Hartig
18 were on the public side of the glass, about three feet away. Ms. Fital and NukeyManglona were
19 about twenty feet behind AAG Badawy, Ms. Fitial was standing, and NukeyManglona was seated
20 on a couch. Both Ms. Fitial and NukeyManglona were within earshot of the attorneys.

21 Within earshot of Ms. Fitial and NukeyManglona, the attorneys began discussing the
22 location of the upcoming potential interview between NukeyManglona and the defense team.
23 AAGBadawy recalled that the Court had ordered the interview to take place at the courthouse. The
24 discussion became heated. When the topic of holding the interview at the OPD office came up,

1 AAG Badawy said that this was not a “neutral place” and instead suggested that the interview take
2 place at the OAG office. Judge Wiseman’s order had intended that the interview be free from OAG
3 interference. Here, AAG Badawy was again taking control of where and how NukeyManglona
4 would be interviewed by the defense team.

5 After a few more heated exchanges, AAG Badawy asked CPDHartig “Why are you being
6 such a little bitch?” CPDHartig replied “Excuse me?” to which AAGBadawy responded “You heard
7 me.” Again CPDHartigsaid, “Excuse me?” and again AAGBadawyreplied “You heard me.” CPD
8 Hartig then asked AAGBadawy, “When are you going to let him out of his cage?”

9 After this heated exchange finished, APD Schwartz, CPD Hartig, NukeyManglona, and Ms.
10 Fitial left the OAG office and walked to the courthouse with OPD Investigator Kapileo. Although
11 NukeyManglona did not request the presence of a victim advocate, Ms. Fitial, who is OAG staff,
12 was present. During the walk, NukeyManglona’s demeanor changed from earlier in the day,
13 seeming confused and hesitant, and stopping when Ms. Fitial would stop walking.

14 When the group arrived at the courthouse, they went to the Courthouse Atrium to begin the
15 interview. The defense team began rearranging tables so that the meeting could begin.
16 NukeyManglona then asked Ms. Fitial, what would happen if he left the interview, and she told
17 him, “It’s your choice.” Although Ms. Fitial initially went to the Courthouse Atrium with
18 NukeyManglona, she left upon APD Schwartz’s request.

19 NukeyManglona initially sat across the room, away from the tables arranged by defense
20 counsel, but then moved and sat across from APD Schwartz. CPDHartig attempted to make small
21 talk with NukeyManglona about the morning’s flight, but he was not receptive. NukeyManglona
22 refused to talk to the defense attorneys. When asked why he did not want to discuss the case, he
23 responded, “It’s not gonna help me.” After two to three minutes, he left the room. Upon returning to
24 the OAG office, NukeyManglona also refused to talk about this case with AAG Badawy.

1 At the October 21, 2014 evidentiary hearing, NukeyManglona appeared briefly at the Rota
2 Courthouse before vanishing without testifying. Rota Court staff stayed at the Courthouse in case
3 NukeyManglona returned, but he did not return and he was unable to be located by OAG staff or
4 Court Marshals. All efforts to contact NukeyManglona through friends or family were unsuccessful.
5 NukeyManglona clearly did not want to be found.

6 Judge Camacho granted the Defendant's Motion to Reconsider on October 22, 2014 in its
7 Order Granting Defendant's Second Motion to Exclude Testimony of NukeyManglona Based on
8 Due Process Right to Access Witnesses Without Government Interference (Prosecutorial
9 Misconduct) ("October 22, 2014 Order").

10 **3. The Commonwealth's Motion to Reconsider**

11 On Wednesday, October 22, 2014, the Court issued its Order Granting Defendant's Second
12 Motion to Exclude Testimony of NukeyManglona Based on Due Process Right to Access
13 Witnesses Without Government Interference (Prosecutorial Misconduct). On Thursday, October 23,
14 2014, then AAGBadawy filed the Commonwealth's Motion to Reconsider Order Granting
15 Defendant's Second Motion to Exclude Testimony of NukeyManglona and/or Motion to Stay Jury
16 Trial for Purpose of Filing an Appeal. The Defendant filed his Opposition to Commonwealth's
17 Motion for Reconsideration/Stay Pending Appeal on Friday, October 24, 2014.

18 The Commonwealth Supreme Court issued a stay on Friday, October 24, 2014.⁹ The stay
19 was transmitted and filed in the Commonwealth Superior Court on Monday, October 27, 2014. On
20 the morning of October 27, 2014, jury selection had already begun in this case. The Court
21 dismissed the jurors as a result of the stay in the proceedings ordered by the Commonwealth
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24 ⁹ The Commonwealth Supreme Court issued its stay on October 24, 2014. *Commonwealth v. Taitano*, No. 2014-SCC-0021-CRM (NMI Sup. Ct. Oct. 24, 2014) (Order Granting Stay).

1 Supreme Court. One week later, on November 3, 2014, the Commonwealth Supreme Court lifted
2 the stay.¹⁰

3 This Court then set a status conference in this case for February 11, 2015 at 9:00 a.m. This
4 status conference was continued to March 25, 2015. At the March 25, 2015 status conference,
5 Assistant Attorney General Clayton Graef indicated to the Court that the Commonwealth was
6 unsure if the Commonwealth Superior Court or Commonwealth Supreme Court currently had
7 jurisdiction over the case. The status conference was continued to April 1, 2015, to allow Mr. Graef
8 to check on the status of the case. On April 1, 2015, Assistant Attorney General Chester Hinds
9 notified the Court that the Commonwealth Superior Court had jurisdiction over the case due to the
10 pending Commonwealth motion. On April 2, 2015, the Court heard oral arguments on the
11 Commonwealth's Motion to Reconsider.

12 The Commonwealth is asking that the Court reconsider these decisions:

- 13 1. The Court's finding that prosecutorial misconduct occurred.
- 14 2. The Court's findings of fact in its October 22, 2014 Order Granting Defendant's Second
15 Motion to Exclude.¹¹
- 16 3. The Court's exclusion of NukeyManglona's testimony.

18 III. LEGAL STANDARD

19 A court may reconsider its earlier ruling when there is "an intervening change of controlling
20 law, availability of new evidence, or the need to correct a clear error or prevent manifest injustice."

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22 ¹⁰ In the Supreme Court's Order Lifting Stay, Chief Justice Castro stated that "[t]he Court is concerned about (1) the
23 demeanor of the parties and urges that they maintain civility while zealously representing their clients; and (2) the
Commonwealth's notice of appeal, notwithstanding that the trial court's order excluding Manglona's testimony is not a
final order." *Commonwealth v. Taitano*, No. 2014-SCC-0021-CRM (NMI Sup. Ct. Nov. 3, 2014) (Order Lifting Stay).

24 ¹¹ The Commonwealth argues both that "the Court relied on erroneous evidence" and that the Court "committed clear
error in not requiring the testimony of the alleged victim" at the evidentiary hearing. Commonwealth's Mot.to
Reconsider at 5-6. As both of these statements relate to the Court's factual findings, the Court will treat them as such.

1 *Commonwealth v. Eguia*, 2008 MP 17 ¶ 7 (citing *Camacho v. J.C. Tenorio Enterprises, Inc.*, 2 NMI
2 408, 414 (1992)).¹² This standard applies in both civil and criminal matters. *Id.* Motions to
3 reconsider “[serve] the narrow purpose of allowing a party to correct manifest errors of law or fact
4 or to present newly discovered evidence.” *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir.
5 2004) (quoting *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989)).

6 “To be clearly erroneous . . . a decision must strike [the Court] as more than just maybe or
7 probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated
8 dead fish.” *United States v. Bussell*, 504 F.3d 956, 962 (9th Cir. 2007) (citation and internal
9 quotation marks omitted). In essence, the decision must be “dead wrong.” *TFWS, Inc. v. Franchot*,
10 572 F.3d 186, 194 (4th Cir. 2009) (quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*,
11 866 F.2d 228, 233 (7th Cir. 1988)).

12 According to Black’s Law Dictionary, manifest injustice is “[a] direct, obvious, and
13 observable error in a trial court, such as a defendant’s guilty plea that is involuntary or is based on a
14 plea agreement that the prosecution has rescinded.” BLACK’S LAW DICTIONARY 822 (9th Ed.
15 Abridged 2010). Courts have applied this definition to manifest injustice in context of motions to
16 reconsider. *Shearer v. Titus (In re Titus)*, 479 B.R. 362 , 367-368 (citation omitted). Manifest
17 injustice requires that “the record presented be so patently unfair and tainted that the error is
18 manifestly clear to all who view it.” *Id.*

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22 ¹²As this motion was filed on October 23, 2014, regarding an order issued on October 22, 2014, which is within the
23 filing window for NMI R. Civ. P. 59(e) motions, the Court will treat this motion to reconsider as a motion under Rule
24 59(e). Rule 59(e) and Rule 60(b) motions are similar, but “[w]hether a motion is construed as a Rule 59(e) or Rule
60(b) motion depends upon the time in which the motion is filed.” *China Color Printing v. Pacific Information Bank*,
Civ. No. 99-0747 (NMI Super. Ct. Feb 23, 2012) (Order Denying Defendant’s Motion to Alter or Amend the Court’s
January 3, 2012 Order at 3) (quoting *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1242 (10thCir. 2006). “A
motion for reconsideration filed within ten days of entry of judgment will fall under Rule 59(e); whereas, a motion filed
after that time will fall under Rule 60(b).” *Id.* (internal citations omitted).

1 Reconsideration may not be used “to repeat old arguments previously considered and
2 rejected, or to raise new legal theories that should have been raised earlier.” *National Metal*
3 *Finishing Com. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990).
4 Commonwealth law favors the finality of court decisions, to “maintain consistency and avoid
5 reconsideration of matters once decided during the course of a single continuing lawsuit.” *Cushnie*
6 *v. Arriola*, 2000 MP 7 ¶ 14. “Reconsideration of a judgment after its entry is an extraordinary
7 remedy that should be used sparingly.” *Templet*, 367 F.3d at 479 (citing *Clancy v. Employers*
8 *Health Ins. Co.*, 101 F. Supp. 2d 463, 465 (E.D. La. 2000).

10 IV. DISCUSSION

11 **A. There Was No Clear Error or Manifest Injustice in the Court’s October 22, 2014 Order, 12 Thus the Court Will Not Reconsider Its Ruling**

13 There was no clear error in the Court’s finding that prosecutorial misconduct occurred, the
14 Court’s factual findings, or the Court’s decision to exclude NukeyManglona’s testimony. Nor was
15 there manifest injustice resulting from the Court’s decision to exclude NukeyManglona’s testimony.
16 The Court would like to underscore that the present Commonwealth motion is, in essence, a motion
17 to reconsider asking that the Court reconsider its granting of a prior motion to reconsider. The Court
18 declines to reconsider a past motion to reconsider, as “[r]econsideration of a judgment after its entry
19 is an extraordinary remedy that should be used sparingly.” *Templet*, 367 F.3d at 479. The Court has
20 already reconsidered the ruling on the issue of NukeyManglona’s testimony once, and to do so
21 twice would make this Court’s rulings fickle and unpredictable. Commonwealth law favors the
22 finality of court decisions to “maintain consistency and avoid reconsideration of matters once
23 decided during the course of a single continuing lawsuit.” *Cushnie v. Arriola*, 2000 MP 7 ¶ 14.

1 The level of error required to show clear error has been likened to the stench of “a five-
2 week-old, unrefrigerated dead fish.” *Bussell*, 504 F.3d at 962. No such stench is present in the
3 October 22, 2014 Order. Likewise, any claims that the Court’s exclusion of NukeyManglona’s
4 testimony would result in manifest injustice are simply attempts to show dissatisfaction with the
5 end result, which is insufficient for a motion to reconsider. The decision must be “dead wrong,”
6 rather than merely a result that a party is dissatisfied with. *TFWS, Inc.*, 572 F.3d at 194 (quoting
7 *Sterling Electric, Inc.*, 866 F.2d at 233).

8 The Court will discuss the individual alleged grounds for reconsideration separately below.

9
10 **1. The Court Properly Granted the Defendant’s Motion to Reconsider on October 22,
11 2014**

12 At the outset, the Court notes that it properly granted the Defendant’s Motion to Reconsider
13 on October 22, 2014, and that it properly reconsidered the Court’s October 9, 2014 order. When a
14 case is transferred between courtrooms, as this one was, the transferee court may determine if there
15 are grounds for reconsideration, or if a motion to reconsider is simply a “repeated argument by
16 indefatigable diehards.” *Camacho v. J.C. Tenorio Enterprises, Inc.*, 2 NMI 408, 414 (1992)
17 (quoting 18 Wright & Miller, *Federal Practice and Procedure: Jurisdiction* § 4478 (1981)). When
18 the Court considered the Defendant’s Motion to Reconsider, the Court weighed whether there had
19 been clear error in the October 9, 2014 order. *Taitano*, Crim. No. 13-0111 (Order Granting Def.’s
20 Second Mot. to Exclude Test. of NukeyManglona Based on Due Process Right to Access Witness
21 Without Government Interference (Prosecutorial Misconduct) at 7-8).

22 In the Defendant’s Second Motion to Exclude Testimony of NukeyManglona in Light of
23 New Evidence, the Defendant outlined the events of October 2, 2014. The Defendant then went on
24 to allege prosecutorial misconduct and outlined standards from the ABA Model Rules of

1 Professional Conduct and the ABA Standards for Criminal Justice. *See* Defendant’s Second Motion
2 to Exclude Testimony of NukeyManglona in Light of New Evidence at 5. The Defendant argued
3 that he had been prejudiced by the OAG’s actions, and requested that NukeyManglona’s testimony
4 be excluded, or that NukeyManglona be required to submit to a Rule 15 deposition. *Id.* at 15-16.

5 Judge Wiseman’s October 9, 2014 order found that the OAG’s actions had not prejudiced
6 the Defendant. In the October 9, 2014 order, “The Court recognize[d] that both parties may have let
7 their emotions run in light of the circumstances at hand,” but nonetheless declined to find that the
8 October 2, 2014 Incident had prejudiced the Defendant. *Commonwealth v. Taitano*, Crim. No. 13-
9 0111 (NMI Super. Ct. Oct. 9, 2014) (Order Den. Def.’s Mot. to Exclude Test. of Cathy Manglona,
10 NukeyManglona, and Moses Charfauros at 5). The October 9, 2014 order did not examine the ABA
11 Model Rules of Professional Conduct or ABA Standards for Criminal Justice, nor did it set an
12 evidentiary hearing to determine whether AAG Badawy’s actions had prejudiced the Defendant.

13 After this case was transferred to Judge Camacho, the Court reconsidered the October 9,
14 2014 order when the Defendant filed his Motion to Reconsider. This Court then found that “it was
15 clear error to rule that the events surrounding [Nukey] Manglona’s interview did not prejudice
16 Defendant Taitano without holding an evidentiary hearing and applying the standard to the facts
17 determined from that hearing.” *Taitano*, Crim. No. 13-0111 (Order Granting Def.’s Second Mot. to
18 Exclude Test. of NukeyManglona Based on Due Process Right to Access Witness Without
19 Government Interference (Prosecutorial Misconduct) at 7). The Court then went on to examine the
20 ABA Standards for Criminal Justice and the ABA Model Rules of Professional Conduct. *Id.* at 8.

21 The Commonwealth argues that “Judge Camacho committed clear error when he re-opened
22 Judge Wiseman’s findings on the testimony of NukeyManglona.” Commonwealth’s Mot.to
23 Reconsider at 2. Commonwealth fails to show any evidence that there has been clear error in re-
24 opening the findings beyond the fact that Judge Wiseman had found that the events of October 2,

1 2014 did not prejudice the Defendant, and that the Judge Camacho disagreed after holding an
2 evidentiary hearing on the issue and examining applicable law. Commonwealth's Mot. to
3 Reconsider at 3.

4 Judge Wiseman's October 9, 2014 order ruled that there had been no prejudice without
5 examining the relevant legal standards. The October 9, 2014 order also found that there had been no
6 prejudice to the Defendant without ordering an evidentiary hearing to determine the impact of AAG
7 Badawy's actions. Judge Camacho reconsidered Judge Wiseman's October 9, 2014 order related to
8 Nukey Manglona's testimony, as there had been clear error, as the Court had not considered the
9 applicable legal standards. In reconsidering the October 9, 2014 order, the Court noted that

10 [S]tatements nearly identically to those made by AAG Badawy have consistently been
11 found to be improper and potentially prejudicial to the constitutional rights of defendants,
12 the Court determined that it must specifically apply the controlling ethical standards to the
13 case at hand, including the events surrounding [Nukey] Manglona's October 2, 2014
14 interview, and that an evidentiary hearing was necessary to do so.

15 *Taitano*, Crim. No. 13-0111 (Order Granting Defendant's Second Motion to Exclude Testimony of
16 Nukey Manglona Based on Due Process Right to Access Witnesses Without Government
17 Interference (Prosecutorial Misconduct) at 8-9). Thus, it was proper for the Court to reconsider the
18 October 9, 2014 order.

19 **2. The Court's Finding of Prosecutorial Misconduct was Not in Clear Error**

20 The Commonwealth argues that there has been no prosecutorial misconduct in this case.
21 Commonwealth Mot. to Reconsider at 4. The Court will reconsider its finding of prosecutorial
22 misconduct if there is "the need to correct a clear error or prevent manifest injustice." *Eguia*, 2008
23 MP 17 ¶ 7 (citing *Camacho v. J.C. Tenorio Enterprises, Inc.*, 2 NMI at 414). Despite the
24 Commonwealth's arguments, there was no clear error in the Court's finding of prosecutorial
misconduct. "To be clearly erroneous... a decision must strike [the Court] as more than just maybe

1 or probably wrong; it must... strike us as wrong with the force of a five-week-old, unrefrigerated
2 dead fish.” *Bussell*, 504 F.3d at 962. There is no such stench here.

3 Under both the Fourteenth Amendment of the United States Constitution and Article 1,
4 section 5 of the Commonwealth Constitution, criminal defendants are entitled to due process
5 including a fair trial.¹³ This right to a fair trial includes a right to access and attempt to interview
6 potential witnesses, unimpeded by actions of the government. *Gregory v. United States*, 369 F.2d
7 185, 188 (D.C. Cir. 1966); *United States v. Scott*, 518 F.2d 261, 267-68 (6th Cir. 1975).

8 Prosecutors bear a heavy burden in ensuring that the law of the land is upheld. “It is
9 imperative that prosecutors and other officials maintain a posture of strict neutrality when advising
10 witnesses of their duties and rights. Their role as public servants and as protectors of the integrity of
11 the judicial process permits nothing less.” *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978).
12 Although all attorneys must zealously advocate for their clients, prosecutors must not engage in
13 conduct that will infringe upon a defendant’s rights. “[W]hile [a prosecutor] may strike hard blows,
14 he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods
15 calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a
16 just one.” *Berger v. United States*, 295 U.S. 78, 88 (1935).¹⁴

17
18 ¹³ The Due Process Clause of the United States Constitution applies in this jurisdiction through Section 501(a) of the
19 Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of
20 America, 48 U.S.C. § 1801 note. Additionally, because Article 1, Section 5 of the Commonwealth Constitution is
analogous to section 1 of the Fourteenth Amendment to the U.S. Constitution, “federal case law interpreting the
Fourteenth Amendment is directly applicable to the Commonwealth.” *Commonwealth v. Minto*, 2011 MP 14 ¶ 22.

21 ¹⁴ The Court especially emphasizes the special role that a prosecutor has in our legal system, and finds the language
from *Berger* to be particularly instructive.

22 “[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose
obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,
therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is
in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not
escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while
23 he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper
methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just
24 one.”

Berger, 295 U.S. at 88.

1 In determining whether there had been prosecutorial misconduct in the present case, the
2 Court relied on case law, the ABA Standards for Criminal Justice, and the ABA Model Rules of
3 Professional Conduct. *Taitano*, Crim. No. 13-0111 (Order Granting Def.’s Second Mot. to Exclude
4 Test. of NukeyManglona Based on Due Process Right to Access Witness Without Government
5 Interference (Prosecutorial Misconduct) at 8). In particular, the Court referenced the ABA
6 Standards for Criminal Justice, which states that “[a] prosecutor should not discourage or obstruct
7 communication between prospective witnesses and defense counsel. A prosecutor should not advise
8 any person or cause any person to be advised to decline to give to the defense information which
9 such person has the right to give.” Rule 3-3.1(d), ABA Standards for Criminal Justice: Prosecution
10 and Defense Function, 3rd ed. (1993). In addition, Rule 3.4(a) of the Model Rules of Professional
11 Conduct state that an attorney shall not “unlawfully obstruct another party’s access to evidence.”
12 The Court took these rules, in particular the ABA Standards for Criminal Justice Rule 3-3.1(d), into
13 account when examining AAG Badawy’s actions.¹⁵ *See Taitano*, Crim. No. 13-0111 (Order Granting
14 Def.’s Second Mot. to Exclude Test. of NukeyManglona Based on Due Process Right to Access
15 Witness Without Government Interference (Prosecutorial Misconduct) at 13.

16 Generally, cases related to prosecutor communications with witnesses fall into two
17 categories: (1) those where the witness is merely informed of their right to decline an interview with
18 the defense team; and, (2) those where the prosecutor discouraged the witness from interviewing
19 with the defense team. Merely informing a witness that he may accept or decline an interview is
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23 ¹⁵ The ABA Model Rules of Professional Conduct apply in the Commonwealth. NMI Disc. R. 2. In addition to the
24 ABA’s Model Rules of Professional Conduct applying in the CNMI, the CNMI Supreme Court has indicated that ABA
Standards are the appropriate measure for imposing sanctions in cases of attorney discipline. *In re Yana*, 2014 MP 1
¶ 39. Thus, this Court finds it appropriate to look to the ABA Criminal Justice Standards concerning prosecutor conduct
for guidance in determining whether the conduct in this case was proper.

1 acceptable.¹⁶ Going beyond this and indicating that a witness should not speak with the defense
2 team, because it may hurt the case, or indicating that this interview should not occur without the
3 prosecutor present, is impermissible interference.¹⁷

4 The Court, in determining that prosecutorial misconduct had occurred, examined a number
5 of cases related to prosecution statements to witnesses. In *United States v. Black*, the prosecutor
6 sent a letter to prospective witnesses stating, “At some point prior to trial you may be contacted by
7 an attorney on behalf of the defendant. You may speak to this person if you choose, but have no
8 obligation to do so.” 767 F.2d 1334, 1337 (9th Cir. 1985). This did not constitute interference, since
9 “[w]hile the prosecution may not interfere with a witness’ free choice to speak with the defense . . .
10 merely informing the witness that he may decline the interview is not improper.” *Id.* at 1338.

11 The Commonwealth argues that the Court should follow *Black* and find that there has been
12 no misconduct in this case. Commonwealth’s Mot.to Reconsider at 4-5. However, AAG

13
14 ¹⁶ Informing a witness only of the right to accept or decline an interview with defense counsel is unproblematic. *United*
15 *States v. Black*, 767 F.2d 1334 (9th Cir. 1985) (Prosecutor sent letter that stated: “At some point prior to trial you may
16 be contacted by an attorney on behalf of the defendant. You may speak to this person if you choose, but have no
17 obligation to do so.”); *United State v. Bittner*, 728 F.2d 1038 (8th Cir. 1984) (FBI agent’s statement to witness that she
18 did not have to talk to defense attorney was not impermissible interference); *Kines v. Butterworth*, 669 F.2d 6 (1st Cir.
1981) (No further action necessary where, upon court order, prosecutor told police officer witnesses that they had a
19 right to talk to defense attorney to remedy state trooper’s earlier instruction not to do so); *United States v. White*, 454
20 F.2d 435 (7th Cir. 1971) (No denial of right to fair trial where agent witnesses were informed by prosecutor that they
21 had no obligation to speak to defense attorney, and there was no evidence on record to support defendant’s allegation
22 that witnesses were instructed not to speak with defense attorney); *State v. Guzman*, 138 Idaho 869 (Idaho Ct. App.
2003) (No deprivation of right to access witness where prosecutor informed victim of choice whether to speak with
23 defense counsel).

24 ¹⁷ Any advice or indication that it would be better not to speak to a defense attorney, or request that no interview be
given without the presence of the prosecutor is improper. *State v. Hofstetter*, 75 Wn. App. 390 (Wash. Ct. App. 1994)
(Prosecutorial misconduct where witness told not to speak with defense unless prosecutor present on penalty of
withdrawing plea deal); *State v. York*, 632 P.2d 1261 (Or. 1981) (Improper for prosecutor to advise that “it would be
better if [witness] didn’t say anything” to defense before trial); *Story v. State*, 721 P.2d 1020 (Wyo. 1986) (Misconduct
where prosecutor told witness to seek his approval before talking to anyone); *Gregory v. United States*, 369 F.2d 185
(D.C. Cir. 1966) (Violation of due process where prosecutor advised witness “not to speak to anyone about the case
unless [prosecutor] was present.”); *State v. Simmons*, 203 N.W.2d 887 (Wis. 1973) (Improper for prosecutor to advise
witness through communication with witness’ mother “not to talk to anyone about the case except in his presence.”);
State v. Williams, 581 P.2d 1290 (N.M. Ct. App. 1978) (Finding that if police officers were refusing defense interview
based on instructions by prosecutors, the advice would be in violation of ABA Standards); *State v. Caughron*, 855
S.W.2d 526 (Tenn. 1993) (Clear prejudice to defendant due to lack of witness access where prosecutor instructed victim
be kept at home and instructed victim’s mother that she should not let the victim discuss the case with defendant’s
attorneys).

1 Badawy's actions go far beyond those described in *Black*. AAG Badawy herself admits that she told
2 Mr. Manglona "it is not in your best interest to speak with [the OPD], if you don't want to speak
3 with them, because they represent the Defendant." Aff. Margo Badawy (Aug. 20, 2014). This is
4 several steps beyond merely telling a witness they have a choice in providing an interview—AAG
5 Badawy's went so far as to tell NukeyManglona that it was "not in [his] best interest to speak with
6 them." *Id.*

7 In addition, the Court notes that AAG Badawy's conduct went far beyond any conduct that
8 was outlined in *Black*. AAG Badawy interfered with the OPD's access to NukeyManglona. OAG
9 withheld information from the OPD about when NukeyManglona would be arriving in Saipan for
10 the interview with the OPD. AAG Badawy had NukeyManglona brought to the OAG office to read
11 over the Court's orders and emphasize that it was NukeyManglona's choice whether to be
12 interviewed, pre-disposing the witness to refuse to be interviewed. AAG Badawy also called the
13 OPD on the phone, in the presence of NukeyManglona, and proceeded to have a heated phone
14 conversation. AAG Badawy then had a heated argument with CPD Hartig in the presence of
15 NukeyManglona, where she called CPD Hartig a "little bitch." By calling the Chief Public
16 Defender a "little bitch," AAG Badawy undermined CPD Hartig's position, which further
17 predisposed NukeyManglona to be reluctant to speak with anyone on the defense team.¹⁸ The
18 situation progressed to a point where the Defendant effectively did not have access to this particular
19 witness.

20 The Court in particular would like to emphasize that in numerous other cases related to
21 interference with witnesses, the level of misconduct never rose to the level seen in the present case.

22
23 ¹⁸ The Court is particularly concerned by how AAG Badawy's statements undermined and minimized CPD Hartig's
24 position. The position of Chief Public Defender is one that is nominated by the CNMI Governor with the consent and
advice of the CNMI Senate. 1 CMC § 2202. This is a position of public importance. As this position requires
confirmation and approval by the CNMI Senate, the Chief Public Defender occupies a public position as an expression
of the will of the people.

1 In *United States v. Rich*, a defendant argued that he had been denied equal pretrial access to
2 witnesses when an FBI agent “advised the witnesses that they were not required to discuss the case
3 with the defendants of their attorneys.” 580 F.2d at 933. Although this advisement was not found to
4 have improperly limited defense access to witnesses, the court noted that “[o]ur present decision
5 should not be interpreted as approving any governmental conduct that has the purpose or effect of
6 discouraging witnesses from cooperating with the counsel of an accused.” *Id.* at 934. Further, “[a]n
7 accused and his counsel have rights of access to potential witnesses that are no less than the
8 accessibility to the potential prosecutors and their investigatory agents.” *Id.* AAG Badawy’s actions
9 and statements limited the OPD’s access to NukeyManglona, to the point that NukeyManglona has
10 completely shut down and no longer wishes to cooperate with anyone in this case, be it AGO, OPD,
11 or the Court. For instance, although NukeyManglona appeared at the Rota Courthouse for the
12 October 21, 2014 evidentiary hearing, he left without testifying and was unable to be located by
13 OAG staff or Court Marshals.

14 Another case similar to the present situation, which was relied upon by the Court in granting
15 the Defendant’s Motion to Reconsider is *United States v. Peter Kiewet Sons’ Co.*, 655 F.Supp. 73
16 (D. Colo. 1986). The *Peter Kiewet Sons’ Co.* court found that the witnesses were told by
17 government representatives that “they couldn’t or shouldn’t talk with defense representatives.” 655
18 F.Supp. at 76. These witnesses “had been persuaded, either by statements or conduct of the
19 prosecutors” that a defense interview might not be the best idea. *Id.* at 76-77. Although there was no
20 showing that government attorneys had actively “ordered the witnesses not to be interviewed by the
21 defense, it is apparent to [the Court] that the prosecution’s ‘advice’ and conduct at least strongly
22 implied that the witnesses should decline the requested defense interviews.” *Id.* at 77-78. In the
23 present case, AAG Badawy’s preference that NukeyManglona not speak with the OPD was clearly
24 demonstrated, not only through statements, but also through her conduct leading up to and during

1 the “Little Bitch Incident.” Shortly before the scheduled OPD interview, in the presence of the
2 witness, AAG Badawy not only expressed frustration with the OPD attorneys, but got into a heated
3 argument with CPD Hartig and called him a “little bitch.” The Court is certain that this sort of
4 conduct is the kind that would clearly communicate to a witness that the OPD is not on his side and
5 that he should not cooperate with them.

6 AAG Badawy claims that she “did not know this witness was sitting behind her” when she
7 was arguing with CPD Hartig and calling him a “little bitch” on October 2, 2014. Commonwealth’s
8 Mot.to Reconsider at 6. AAG Badawy’s claim that she did not know that NukeyManglona was
9 sitting behind her is irrelevant to any inquiry into whether NukeyManglona was discouraged from
10 speaking with the defense team. “Whether the State’s representative acted in good faith is irrelevant
11 to the inquiry.” *State v. Blazas*, 432 N.J. Super.326, 345 (N.J. App. 2013).

12 As there was no clear error, the Court will not reconsider its decision related to prosecutorial
13 misconduct.

14 **3. There Was No Clear Error in the Court’s Factual Findings in its October 22, 2014**
15 **Order**

16 The Court will reconsider its earlier ruling if there is a “need to correct a clear error.” *Eguia*,
17 2008 MP 17 ¶ 7. Motions to reconsider “[serve] the narrow purpose of allowing a party to correct
18 manifest errors of law or fact or to present newly discovered evidence.” *Templet v. Hydrochem Inc.*,
19 367 F.3d at 479. Here, the Commonwealth is arguing that the Court “relied on erroneous evidence”
20 by not requiring testimony from NukeyManglona in addressing the October 2, 2014 incident
21 between AAG Badawy and CPD Hartig. Commonwealth’s Mot.to Reconsider at 5. Further, the
22 Commonwealth argues that it was clear error for the Court to make its factual findings regarding the
23 October 2, 2014 incident based on testimony from KeolaFitial and Ulysses Kapileo, rather than
24 hearing from NukeyManglona himself. *Id.* at 6.

1 In addition, the Commonwealth argues that “[t]he undersigned prosecutor did not know this
2 witness was sitting behind her,” and that “any chilling effect on NukeyManglona’s speech . . . could
3 have been from defense counsel’s own words.” *Id.* at 6. According to the Commonwealth, “It is
4 clear error to make a factual finding based on an individual’s state of mind without hearing it
5 firsthand from the individual himself.” *Id.* In essence, rather than providing the Court with new
6 evidence or showing a clear error in its factual finding, the Commonwealth is merely aiming to re-
7 characterize the evidence and argue that the evidence used by the Court was insufficient, despite the
8 fact that the Court held an evidentiary hearing on the matter.

9 The Court made its findings of facts based upon an evidentiary hearing. “If a [evidentiary]
10 hearing is necessary, the trial judge must determine what was said to [the witness]. The judge must
11 further determine whether the witness voluntarily chose to deny access or whether there was
12 substantial government interference with [his] ‘free and unhampered choice’ to grant or deny the
13 defense an interview.” *State v. Blazas*, 432 N.J. Super.326, 345 (N.J. App. 2013). The Court held an
14 evidentiary hearing on October 21, 2014, where it determined that AAG Badawy’s words and
15 conduct made NukeyManglona unwilling to be interviewed, or even to testify. The Court noted
16 that, “the preference of AAG Badawy that [Nukey] Manglona not interview with the defense was
17 expressed both in words, multiple times, and through the conduct of expressing frustration, and
18 even disgust, with the defense attorneys in the presence of the witness, moments before the court-
19 ordered potential interview was to be available.” *Taitano*, Crim. No. 13-0111 (Order Granting
20 Defendant’s Motion to Exclude Testimony of NukeyManglona Based on Due Process Right to
21 Access Witnesses Without Government Interference (Prosecutorial Misconduct) at 18).

22 The Commonwealth cites to *Blazas* to imply that the Court should have heard testimony
23 from NukeyManglona directly. Commonwealth’s Mot.to Reconsider at 6. *Blazas* held that the trial
24

1 court had erred in failing to hold an evidentiary hearing—the *Blazas* Court did not dictate how to
2 run such an evidentiary hearing. *State v. Blazas*, 432 N.J. Super.at 328.

3 The Court notes that it may well be impossible to hear from NukeyManglona regarding the
4 events of October 2, 2014. NukeyManglona came to the Rota Courthouse for half an hour on
5 October 21, 2014, the date of the evidentiary hearing, and left without testifying. The OAG and
6 Rota Court staff were unable to locate NukeyManglona after he left the Rota Courthouse. The
7 Commonwealth, in its Motion to Reconsider, argues that the Court should have waited for
8 NukeyManglona to be brought back to the Rota Courthouse. Commonwealth’s Mot.to Reconsider
9 at 7. In fact, court staff waited for NukeyManglona. Despite numerous attempts to locate him by
10 Court Marshals and the AGO’s office, NukeyManglona could not be found. As NukeyManglona
11 was unable to be located – and did not want to be found – the Court made factual findings based
12 upon the evidence presented at the hearing. Further, the Commonwealth has failed to provide any
13 case law to support its assertion that “[t]o make factual findings without the witness’ own testimony
14 is clear error.” Commonwealth’s Mot.to Reconsider at 7.

15 Further, the Court notes that NukeyManglona’s hesitance to be interviewed only increased
16 over time—evolving from mere hesitance to avoidance. First, he did not want to talk to the OPD.
17 Then, he did not want to talk with the OPD or OAG. Finally, he did not want to talk to the OPD,
18 AGO, or the Court.

19 There was no clear error in the Court’s factual findings from the October 21, 2014
20 evidentiary hearing, and thus the Court will not reconsider its findings.

21 **4. There was No Clear Error or Manifest Injustice in the Court’s Exclusion of**
22 **NukeyManglona’s Testimony**

23 The Commonwealth argues that the Court improperly excluded NukeyManglona’s
24 testimony, arguing that the exclusion is both a clear error and results in manifest injustice.

1 Commonwealth's Mot.to Reconsider at 2, 8. The Court will address these two arguments
2 separately.

3 **a. There was No Clear Error in the Court's Decision to Exclude the Testimony of**
4 **NukeyManglona**

5 Clear error, as described above, requires error so apparent that it reeks with the stench of "a
6 five-week-old, unrefrigerated dead fish." *Bussell*, 504 F.3d at 962. No such stench is present here.
7 The Commonwealth states that "[t]he Court relied on incorrect law" in deciding to exclude
8 NukeyManglona's testimony, as the Defendant was not "substantially prejudiced" by AAG
9 Badawy's actions.¹⁹ Commonwealth's Mot.to Reconsider at 8. In particular, the Commonwealth
10 argues that a "fair trial can still occur" on cross-examination of the witness and impeachment based
11 on the ample . . . discovery tendered to the defense counsel." *Id.*

12 "The right to present a complete defense encompasses access to adverse witnesses during
13 the investigation phase of the defense." *Blazas*, 432 N.J. Super. at 341. The right to access adverse
14 witnesses prior to trial is "necessarily implied by the right to a 'meaningful opportunity to present a
15 complete defense.'" *Fenenbock v. Dir. of Corr. for Cal.*, 681 F.3d 968, 974 n5 (9th Cir. 2012). By
16 effectively denying the defense team access to NukeyManglona, the defense team has been unable
17 to interview a key witness and thus will be unable to present a complete defense. Although the
18 Commonwealth argues that the defense team could still have a fair trial through cross-examination
19 and impeachment, the Commonwealth provides no precedent on point in its written brief.

20 To show prejudice, the Defendant "must show more than merely the witnesses'
21 inaccessibility." *State v. Mussehl*, 396 N.W.2d 865, 869 (Ct. App. Minn. 1986) (citing *Kines v.*

22 ¹⁹ Prejudice has been described as an "absence of fairness that fatally infected the trial; the acts complained of must be
23 of such quality as necessarily prevents a fair trial." *Cacoperdo v. Demosthenes*, 37 F.3d 504 (9th Cir. 1994) (citation
24 omitted). The Court notes that, even if it were to find that the Defendant was not *yet* prejudiced, that it considers the
approach taken in *Brady* cases involving the withholding of evidence to be instructive. In cases involving *Brady*
violations, "the court has broad discretion to remedy the problem before the accused is prejudiced by non-disclosure."
Commonwealth v. Campbell, 4 N.M.I. 11, 16 (1993).

1 *Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981)). The Defendant “must show actual prejudice, a real,
2 substantive impairment of his right to a fair trial.” *Id.* In *Mussehl*, the prosecutor sent a letter to
3 witnesses asking that they advise him and request that he be present if the witnesses speak with
4 defense counsel. *Id.* at 866. After defense counsel expressed concerns, the prosecutor sent a
5 clarification letter stating that the witnesses are entitled to grant or deny a defense interview. *Id.* The
6 court found that this was mere inaccessibility, rather than “actual prejudice.” *Id.* at 869.

7 The court in *Mussehl* compared their situation to that in *Gregory v. United States*, where a
8 “prosecutor advised the witnesses not to talk to anyone unless he was present. *Mussehl*, 396
9 N.W.2d at 869 (discussing *Gregory*, 369 F.2d 185 (D.C. Cir. 1966)). In *Gregory*, this instruction
10 effectively denied the defendant a fair trial, as it “effectively denied defense counsel access to the
11 witness except in the presence of the prosecutor.” *Id.* In the present case, there has been more than
12 mere inaccessibility to NukeyManglona. Here, the prosecution repeatedly interfered with the
13 defense team’s access to a key witness to the point where this witness was unwilling to even testify
14 before the Court during the October 21, 2014 evidentiary hearing. AAG Badawy’s actions caused
15 NukeyManglona to shut down to the extent that the defense team cannot properly prepare their
16 defense.

17 In the October 22, 2014 Order, the Court examined the relevant standards for prosecutorial
18 misconduct, and found that the events of October 2, 2014 did not remedy any potential prejudice
19 caused by AAG Badawy’s actions, but instead made the witness even more likely to decline to be
20 interviewed by defense counsel. *Taitano*, Crim. No. 13-0111 (Order Granting Defendant’s Second
21 Motion to Exclude Testimony of NukeyManglona Based on Due Process Right to Access Witness
22 Without Government Interference (Prosecutorial Misconduct) at 11-19).

23 The Commonwealth argues that the Defendant “has not shown how his ability to interview
24 the victim pre-trial will prevent him from effectively cross-examining or impeaching

1 [NukeyManglona].” Commonwealth’s Mot.to Reconsider at 8. The Court, in examining the
2 Defendant’s due process right to examine witnesses, looked to case law related to government
3 interference with access to witnesses and found that AAG Badawy’s misconduct not only mirrored
4 but exceeded the misconduct in similar cases. *Taitano*, Crim. No. 13-0111 (Order Granting Def.’s
5 Second Mot. to Exclude Test. of NukeyManglona Based on Due Process Right to Access Witness
6 Without Government Interference (Prosecutorial Misconduct) at 11-19).²⁰ In the present case, AAG
7 Badawy’s conduct not only interfered with the OPD’s access to the witness, but appears to have
8 made him completely unwilling to be interviewed by anyone involved in this case. There was no
9 clear error in the Court determining that the Defendant had been prejudiced, as interviewing
10 NukeyManglona is impossible at this point, and defense counsel will be unable to properly prepare
11 for trial without access to this witness.

12 The Commonwealth also argues that “[e]xclusion is a very drastic remedy, and if this Court
13 finds that defendant is substantially prejudiced here, which the Commonwealth is by no means
14 conceding he is, other remedies, such as a deposition are warranted.” Commonwealth’s Mot.to
15 Reconsider at 8. While it is true that there are lesser remedies, such as deposition, the Court notes
16 that lesser remedies have already failed in the present case.

17 The Commonwealth directed the Court’s attention to *Peter Kiewet Sons’ Co.* for the
18 proposition that exclusion of NukeyManglona’s testimony was unnecessary. In *Peter Kiewet Sons’*
19 *Co.*, the court ordered that the witnesses be deposed by the defense. 655 F.Supp. at 78. The *Peter*
20 *Kiewet Sons’ Co* court considered dismissal as a possible sanction, but found this to be “overly
21 harsh.” *Id.* With regard to the ultimate remedy ordered, the depositions, the *Peter Kiewet Sons’ Co*

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23 ²⁰See *United States v. Black*, 767 F.2d 1334 (9th Cir. 1985); *United States v. Peter Kiewet Sons’ Co.*, 655 F.Supp. 73
24 (D. Colo. 1986); *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978).

1 court noted that, “[w]hile the remedy provided probably cannot fully undo the damage, it may at
2 least provide defense counsel an opportunity to speak with these vital witnesses in a neutral
3 atmosphere where both the interests of the witnesses and of the government can be protected by the
4 presence of counsel.” *Id.*

5 Relying on *Peter Kiewit Sons’ Co.*, the Commonwealth argues that a deposition, rather than
6 exclusion, is the appropriate remedy in this case. Commonwealth’s Mot.to Reconsider at 8. While it
7 is true that lesser remedies do exist, it is also true that lesser remedies were tried and failed in the
8 present case. As the Court noted in its October 22, 2014 Order, one remedy, that the OAG make
9 NukeyManglona available for an interview by the defense team, was insufficient. *See Taitano*, Crim.
10 No. 13-0111 (Order Granting Defendant’s Motion to Exclude Testimony of NukeyManglona Based
11 on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial
12 Misconduct) at 21). In fact, this lesser remedy led NukeyManglona to completely “shut down” as a
13 result of AAG Badawy’s actions and statements on the day of the interview. *Id.* The Court
14 emphasizes that NukeyManglona made himself unavailable for the evidentiary hearing—appearing
15 at the Rota Courthouse, then leaving and becoming un-reachable prior to being called to testify, and
16 ultimately failing to testify. A deposition would not remedy this situation.²¹

17 Further, the Court considered whether a pre-trial deposition would be an adequate remedy in
18 this case, but determined that “there is no indication that a pre-trial deposition would remedy the
19 potential for prejudice.” *Taitano*, Crim. No. 13-0111 (Order Granting Defendant’s Motion to
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21 ²¹ The Court notes that ordering NukeyManglona to appear—and then imposing jail time on him if he does not—would
22 only serve to cause NukeyManglona to further shut down. Making an uncooperative alleged sexual assault victim face
23 jail time would only serve to further victimize the alleged victim. In the present case, the alleged victim has already shut
24 down as a result of AAG Badawy’s actions. The Court declines to put an alleged sexual assault victim in jail, as to do
so would punish the alleged victim. This would turn the whole justice system upside down—where defendants are on
pre-trial release but victims are locked up. This is especially true in a situation like this, where OAG interference, in
particular from AAG Badawy, caused the alleged victim to completely shut down with regard to speaking with anyone
about this case.

1 Exclude Testimony of NukeyManglona Based on Due Process Right to Access Witnesses Without
2 Government Interference (Prosecutorial Misconduct) at 21). The Court was within its discretion
3 when it excluded NukeyManglona’s testimony, and the Commonwealth has failed to show clear
4 error in the exclusion. The Court already tried lesser remedies in this case and they were
5 insufficient. At this point, it is clear that NukeyManglona no longer wants to talk to anyone
6 involved with this case, including the OPD, AGO, and the Court.

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8 **b. There is No Manifest Injustice Resulting from the Court’s Exclusion of
9 NukeyManglona’s Testimony**

10 Manifest injustice is “[a] direct, obvious, and observable error in a trial court, such as a
11 defendant’s guilty plea that is involuntary or is based on a plea agreement that the prosecution has
12 rescinded.” BLACK’S LAW DICTIONARY 822 (9 Ed. Abridged 2010). Courts have applied this
13 definition to manifest injustice in context of motions to reconsider. *Shearer v. Titus (In re Titus)*,
14 479 B.R. 362, 367-368 (citation omitted). Manifest injustice requires that “the record presented be
15 so patently unfair and tainted that the error is manifestly clear to all who view it.” *Id.*

16 Simply stating that one is unhappy with a court’s decision is insufficient to show manifest
17 injustice. The Commonwealth, by arguing that there are lesser remedies than exclusion, is simply
18 expressing dissatisfaction with the end result. There is nothing in the Court’s October 22, 2014
19 Order that is anywhere near as obviously manifestly unjust as “a defendant’s guilty plea that is
20 involuntary or that is based on a plea agreement that the prosecution rescinds.” BLACK’S LAW
21 DICTIONARY 822 (9 Ed. Abridged 2010). Thus, the Court will not reconsider its ruling as there has
22 been no manifest injustice resulting from the exclusion of NukeyManglona’s testimony.

23 As there was neither clear error nor manifest injustice in the Court’s exclusion of
24 NukeyManglona’s testimony, the Court will not reconsider its decision.

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V. CONCLUSION

Accordingly, the Commonwealth's motion to reconsider is **DENIED**.

IT IS SO ORDERED this 27th day of August, 2015.



JOSEPH N. CAMACHO
Associate Judge